ORIGINAL

Supreme Court, U.S.
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ALEXANDER L. STEVAS
CLERK

NO. 84-288

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

THE SACRAMENTO BEE, Published by McClatchy Newspapers, a California Corporation,

Petitioner,

v.

THE MUNICIPAL COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF SACRAMENTO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA MUNICIPAL COURT FOR THE COUNTY OF SACRAMENTO

BRIEF IN OPPOSITION

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United States Constitution:

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OPINIONS BELOW

No opinion was issued in the courts below.

JURISDICTION

The facts relating to the Court's jurisdiction in this matter are as set forth in the Petition, pages 1 and 2, under the heading "Jurisdiction".

STATEMENT OF THE CASE

In the underlying criminal action, the Real Party in Interest, RONNY WILLIAM MOZINGO, was charged with three counts of battery and battery against a custodial officer in violation of California Penal Code sections 242 and 243(c), respectively. The charges arose from an altercation with Sacramento County Sheriff's deputies at the county jail, where the Real Party was, and currently is, awaiting re-trial on charges of the rape and murder of his step-mother on December 18, 1979. His conviction of those crimes, for which he had been sentenced to death, was reversed by the California Supreme Court based on incompetence of counsel. People v. Mozingo (1983) 34 Cal.3d 926.

Because of the publicity generated by the death penalty case, and by the concurrent prosecution of the Real Party's uncle, DOUGLAS MOZINGO, for three counts of first degree murder, with special circumstances and nine counts of attempted murder, counsel for the Real Party moved that the preliminary hearing in the battery case be closed to the public pursuant to Penal Code section 868[1]. Defense counsel's declaration in support of said motion is set forth in the Petition at pages 5 through 7.

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1. "The examination shall be open and public. However, upon the request of the defendant and a finding by the magistrate that exclusion of the public is necessary in order to protect the defendant's right to a fair and impartial trial, the magistrate shall exclude from the examination every person except the clerk, court reporter and bailiff, the prosecutor and his or her counsel, the Attorney General, the district attorney of the county, the investigating officer, the officer having custody of a prisoner witness while the prisoner is testifying, the defendant and his or her counsel, the officer having the defendant in custody and a person chosen by the prosecuting witness who is not himself or herself a witness but who is present to provide the

On March 13, 1984, the Municipal Court granted the Real Party's motion to close the preliminary hearing over the objection of petitioner. On March 15, 1984, petitioner filed a direct petition for writ of prohibition or mandate in the California Supreme Court. On March 16, 1984, the California Supreme Court transferred the petition to the Court of Appeal, Third Appellate District. On March 29, 1984, the court of appeal summarily denied the petition. On April 6, 1984, petitioner filed a petition for hearing in the California Supreme Court, which summarily denied the petition on May 24, 1984.

At each stage of the proceedings, petitioner asserted that the press and the public have a qualified First Amendment right to attend preliminary hearings and that California Penal Code section 868 violated that right.

REASONS FOR DENYING THE WRIT

The main purpose of California Penal Code section 868 is to protect the defendant's right to a fair trial. At the preliminary examination, the magistrate determines whether there is reasonable or probable cause to bind the defendant over for trial in superior court. The testimony is very often that of the prosecution only. Penal Code section 868 protects the defendant's right to an impartial and unbiased jury by preventing dissemination of this testimony by the media prior to trial. [People v. Elliot (1960) 54 Cal.2d 498, 504; 354 P.2d 225] Penal Code section 868 also protects the reputation of the person who is unjustifiably accused of crime. [Id. at pp. 504-505]

The California Supreme Court rejected the contention that Penal Code section 868 is an unconstitutional infringement of the public's

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1. (continued)
prosecuting witness moral support, provided that the person so chosen shall not discuss prior to or during the preliminary examination the testimony of the prosecuting witness with any person, other than the prosecuting witness, who is a witness in the examination. Nothing in this section shall affect the right to exclude witnesses as provided in Section 867 of the Penal Code."

right to attend preliminary hearings in San Jose Mercury-News v. Municipal Court (1982) 30 Cal.3d 498, 638 P.2d 655. The court weighed the public's right of access to judicial proceedings, examining "the traditional availability of the source to public scrutiny as well as the relative benefits and burdens of recognizing access rights." [Id., 30 Cal.3d, 498 at p. 509] The court found that the nature and timing of preliminary hearings present dangers that public access may prejudice fair trial rights guaranteed to the accused under the Fifth, Sixth and Fourteenth Amendments. Factual and relevant reporting may be just as unfair as inflaminatory or misleading publicity if it produces a jury pool which is convinced of the defendant's guilt before trial. [Id., 30 Cal.3d 512]

The court further found in San Jose Mercury-News that an evaluation of the type requested by petitioner in the instant case, findings, and consideration of alternatives to closure, are not practicable with respect to preliminary hearings and are not required. [Id., 30 Cal.3d 498, at p. 513]

> Case-by-case evaluation may be appropriate with respect to trials and pretrial suppression hearings conducted after the defendant has been bound over. But a preliminary hearing may be held as early as two days after arraignment or plea unless the prosecution shows good cause or the defendant waives time. In any event it must occur within 60 days after arraignment or plea unless defendant consents to further delay. (Pen. Code, Section 859b)
>
> Often, therefore, it is impossible for defendant to make a showing that in his case prejudice is likely and closure justified. The evidence required may not be available at an early stage, when community reaction and the media's attitude are not clear. Moreover, defendant may have little knowledge before the hearing of the prosecution's strategy and evidence That additionally clouds his ability to prove the value to him of closure.
>
> Finally, certain alternate means of preventing prejudice from adverse pretrial publicity, such as gag orders or restraints on publication, can involve equal and even greater intrusions on speech and press rights. (see, e.g. Nebraska Press Assn., supra, 427 U.S. 529,556-560 [49 L.Ed. 2d 683, 695-698]...Changes of venue or continuances may subject the parties and courts to considerable inconvenience or expense and may even violate the defendant's right to speedy trial in the vicinage. (U.S. Const., Amends, VI, XIV; Cal. Const. Art I § 15) (San Jose Mercury-News v. Municipal Court, supra, 30 Cal.3d 498, 513)

The cases cited by petitioner do not support its contention that the public has a qualified First Amendment right to attend preliminary hearings. Waller v. Georgia, ____U.S._____; 104 S.Ct. 2210 (1984) held that closure of a suppression hearing to the public over the objection of the defendant, violated his Sixth Amendment right to a public trial. It should be noted that the jury had been empaneled prior to the hearing of the suppression motion and that this was therefore not a pretrial hearing.

Press-Enterprise Co. v. Superior Court of Cal. 464 U.S._____; 104 S.Ct. 819 (1984) held that the vior dire examination of potential jurors could not be closed to the public absent findings that closure was essential and consideration of alternatives to closure. This Court made a detailed review of the history of the jury trial and found that the selection of jurors has "presumptively been a public process with exceptions only for good cause shown." [Id., 104 S.Ct. 819, 822] This case does not support petitioner's contentions because jury selection is not truly a pretrial or preliminary proceeding, but an integral part of the trial process itself.

Gannett Co. v. DePasquale 443 U.S. 368 (1979), in section V reviewed in detail the history of the public trial at common law, and found"...there exists no persuasive evidence that at common law members of the public had any right to attend pretrial proceedings; indeed, there is substantial evidence to the contrary. By the time of the adoption of the Constitution, public trials were clearly associated with the protection of the defendant. And pretrial proceedings, precisely because of the same concern for a fair trial, were never characterized by the same degree of openness as were actual trials. 99 Under English common law, the public had no right to attend pretrial proceedings." [Id., at pp. 387-389] This Court went on to cite California Penal Code section 868 as an example of an explicit provision relating to closed pretrial proceedings. [Id., at p. 391, fn. 23] This court held in Gannett that the public has no independent constitutional right to insist upon access to a

pretrial judicial proceeding, in this case, a suppression hearing.

Richmond Newspapers, Inc. v Virginia 448 U.S. 555 addressed the issue of whether the public has a constitutional right to attend criminal trials. This Court held that the First Amendment guarantee the right to attend criminal trials, but does not support petitioner's contention that there is any First Amendment right to attend preliminary or pretrial hearings.

Globe Newspapers Co. v. Superior Court, Etc. _____U.S._____, 102 S.Ct. 2613 (1982) struck down as violating the First Amendment, a Massachusetts statute which required the exclusion of the public from the courtroom during the testimony of minor victims in the trials of specified sex offenses. This case expressly dealt with the public's right to attend trials, and did not deal with the issue of the right of the public to attend preliminary or pretrial hearings.

This Court has recognized that restraints upon the press prior to trial are not necessarily and in all cases invalid. [Nebraska Press Assn. v. Stuart 423 U.S. 1327 (1975)] A footnote in Times - Picayune Pub. Corp. v. Schulingkamp 419 U.S. 1301 (1974) suggests closure of pretrial hearings as an alternative to an order imposing direct limitations on media reporting to protect the defendants from prejudicial pretrial publicity, and cites California Penal Code section 868. [Id., at p. 1308, fn. 3]

The cases cited by petitioner deal with exclusion of the public during the trial phase of the criminal prosecution, "a time when the jurors and witnesses can be otherwise shielded from prejudicial publicity, and also a time when both sides are being heard." [Nebraska Press Assn. v. Stuart, supra, at p. 1332] Petitioner has failed to demonstrate that it, or the public, has a First Amendment right to attend preliminary hearings.

California Penal Code section 868 protects defendants' right to a fair trial before an unbiased jury upon the finding, explicit or necessarily impled, that exclusion of the public is necessary to protect that right. It is submitted that this provision is constitutional.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: December 27, 1984

Respectfully Submitted:

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CERTIFICATE OF SERVICE BY MAIL

I, NANCY A. REGAN, a member of the Bar of the Supreme Court of the United States and counsel for RONNY WILLIAM MOZINGO, Real Party in Interest herein, hereby certify that on December 27, 1984, pursuant to Rule 28.3, Rules of the Supreme Court, I served one copy of the attached BRIEF IN OPPOSITION, MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS, AFFIDAVIT OF RONNY WILLIAM MOZINGO on each of the parties herein by depositing such copies in the United States Post Office, Fair Oaks, California, with first class postage prepaid, properly addressed to the post office addresses of the parties as follows:

JOHN DOUGHERTY
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HON. LEIGHTON HATCH
Judge, Municipal Court
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Sacramento, CA 95814

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DIEPENBROCK, WULFF, PLANT & HANNEGAN
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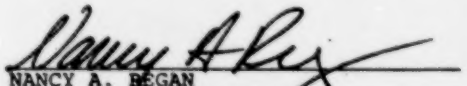
Sacramento, CA 95814

All parties required to be served have been served.

Dated: December 27, 1984



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